UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	7:13−cr−00994−15
	)	
JOSE PALACIOS, JR.	)	

MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Jose Palacios, Jr., ("Palacios") by and through the undersigned counsel, respectfully submits this Memorandum of Law and Facts in Support of Palacios' Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255.

I. BACKGROUND

Palacios was charged by way of superseding indictment for his involvement with an extensive drug trafficking organization. (Docket Entry 221). Palacios later agreed to plead guilty, pursuant to a plea agreement, to one count of possession with the intent to distribute more than 100 kilos of marijuana. (Docket Entry 318). Palacios was represented by Carlos Andres Garcia throughout the proceedings.

At sentencing, Palacios argued that he should be granted a two-level downward adjustment for the safety-valve. In addition, to the extent the Court felt that Palacio's debriefings prior to sentencing were insufficient to entitle him to the adjustment, Palacios' counsel sought to continue the sentencing so Palacios could debrief again. The Court, however, denied Palacios' request for a continuance and the safety-valve. According to the Court, Palacios could make up for the denial of the safety-valve through a Rule 35 later:

MR. GARCIA: I could ask him to execute one now, Judge. We have also -- *I have tendered the -- to the Government an offer of proof in regards to what my client is willing to do for the Government*. Additionally, Judge, *we respectfully ask the Court for additional time to allow Mr. Palacios an additional debriefing*. He has had one opportunity to make -- to debrief. Not that the Government has not offered more opportunities to debrief but *Mr. Palacios stands ready to provide information that would be helpful to the Government in this case*, your Honor, if the Court were so inclined to move his sentencing for a short time.

THE COURT: *I'm going to let him come back on a Rule 35 –*

MR. GARCIA: Yes, your Honor.

THE COURT: -- *if he can be of substantial assistance to the Government*. I feel like he's had plenty of opportunity and it appears that the Government is even complaining he's continued to minimize his involvement and didn't really want to implicate or talk about his father and his father's role in this and hasn't been completely truthful in his debriefings thus far.

MR. ALANIS: Correct, your Honor. We don't believe he's qualified for safety valve. We filed a response to the objections in the PSR detailing our objections to that in regards to his father and also one other unindicted Co-defendant involved with the load at the Moorfield property and additionally that we also clarified what Tabares, Jr. has debriefed which corresponds with what Alejandrina Martinez said about the thousand pounds, the loads going up to Houston to Delfino Bazan in the spring of 2012, corroborating all of her statements.

THE COURT: Right. We have –

MR. GARCIA: And if I may respond to that.

THE COURT: -- we have Bazan corroborating that, Tabares corroborating that. We have Ms. Alejandrina corroborating that. At least those three –

MR. ALANIS: Artemio Blanco out of -- he's indicted on the Beaumont investigation with Delfino Bazan.

THE COURT: But at least in this conspiracy, I know of three other people who've talked about it.

> **MR. ALANIS**: It was Artemio Blanco, Alejandrina Martinez and Jose Jair Tabares, Jr.
>
> **THE COURT**: All right. So what did you want to add on that, Mr. Garcia?
>
> **MR. GARCIA**: Your Honor, just only as to the safety valve objection that we had, your Honor, for the Court to consider that, that he did come in and although he may not have added information about his father, he did provide information about his involvement for the specific case that he pled guilty to.
>
> **THE COURT**: Right. He didn't talk about the six- month worth of loads. I think he only talked about that one seizure. You have to be completely truthful about relevant conduct but, again, *he can make all this up by a Rule 35 motion*-- Rule 32 motion.
>
> **MR. GARCIA**: Yes, your Honor, but -- and *I've explained that to Mr. Palacios and he appears ready to do that, your Honor.*

(Sent. Tr. at 9-12) (emphasis added). The Court then proceeded to determine whether Palacios was entitled to acceptance of responsibility. In doing so, the Court asked Palacios to give a statement about his offense conduct so the Court "know[s] that you admit to and accept responsibility for your actions."

> **THE COURT**: Okay. So, Mr. Palacios, in order to receive the benefits of the acceptance points off, you have to essentially tell me generally what you did and what wrongful conduct you did that constituted this offense so that I know that you admit to and accept responsibility for your actions. Otherwise, you don't get these points off. Do you want to tell me what it is that you did in this conspiracy?

(Sent. Tr. at 13). After hearing from Palacios, the Court granted him acceptance, stating:

> **THE COURT:** And then the -- I'm going to give you your two points off because you've accepted responsibility. *Actually you've given more details than I was prepared for but -- and I could -- I'm curious about other things but I'll leave that to the debriefing.*

(Sent. Tr. at 18) (emphasis added). However, the Court never independently offered Palacios the right allocute after this. The Court then sentenced Palacios to 144 months. (Sent. Tr. at 21).

Palacios filed a timely notice of appeal. (Docket Entry 572). Nevertheless, Palacios' appellate counsel, Mr. Carlos Garcia, failed to pay the required docketing fee and failed to order necessary transcripts. Accordingly, the Fifth Circuit dismissed Palacios' appeal for want of prosecution on June 2, 2014. (Docket Entry 671). This § 2255 motion, which is submitted within one-year and ninety days from the Fifth Circuit's order dismissing Palacios' appeal is timely.

II. STANDARD OF REVIEW

Claims of ineffective assistance of counsel are governed by the familiar two-part test of *Strickland v. Washington*, which requires a showing of (1) deficient performance by counsel; and (2) prejudice, which is demonstrated through a reasonable probability of a different outcome in the proceedings. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

III. ARGUMENT

GROUND ONE: **SENTENCING COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE PALACIOS THAT HE COULD SATISFY THE REQUIREMENTS FOR THE SAFETY VALVE AT THE TIME OF SENTENCING; COUNSEL WAS FURTHER INEFFECTIVE FOR FAILING TO ARGUE THAT PALACIOS HAD A STATUTORY RIGHT TO SATISFY THE REQUIREMENTS FOR THE SAFETY VALVE AT SENTENCING**

Palacios' counsel argued for the safety-valve at sentencing, but the Court declined to apply the two-level reduction because the Court felt that Palacios had not been fully truthful with the Government. (Sent. Tr. at 11-12). Palacios' counsel advised the Court that Palacios stood "ready to provide information that would be helpful to the Government in this case," and accordingly sought a continuance for Palacios to do so. (Sent. Tr. at 11). However, the Court denied Palacios' request for a continuance stating that Palacios could make up for the denial of acceptance through a "Rule 35" after sentencing. Palacios' counsel was ineffective for failing to advise Palacios that he had a statutory right to satisfy the requirements for the safety valve in open court, at the time of sentencing. Had Palacios been so advised, Palacios would have fully detailed his knowledge of the events in the case at the sentencing hearing, which in turn would have required the Court to grant Palacios the safety-valve. Furthermore, rather than ask for a continuance for Palacios to meet the safety-valve's requirements, Palacios' counsel should have merely reminded the Court of Palacios' right to satisfy the requirements of the safety-valve then and there during the sentencing hearing. Having been so advised, there is a reasonable probability the Court would have allowed Palacios to detail his knowledge of the offense to determine if the requirements for the safety-valve were met.

"The safety valve is available so long as the government receives the information *no later than the time of the sentencing hearing*, even if a defendant's last-minute move to cooperate is a complete about-face." *Deltoro–Aguilera v. United States*, 625 F.3d 434, 437 (8th Cir.2010) (emphasis added). *Krecht v. United States*, 846 F.Supp.2d 1268, 1285 (S.D. Fl 2010); *Ardilla v. United States*, 2009 WL 383382 (M.D. Fl 2009) (granting § 2255 motion where defendant had provided necessary information at the time of sentencing, but was denied safety-valve adjustment). While the Court indicated that it would allow Palacios to make up for the loss of acceptance through a "Rule 35," the

Government—and not the Court—was left to decide whether to request a reduction for substantial assistance. Palacios debriefed with the Government post-sentencing, but no motion for reduction in sentence was ever filed. Regardless, a "Rule 35" motion is not a substitute for the safety-valve, as each provide independent means of reducing the sentence. Palacios would have "truthfully provided to the Government all information and evidence the defendant ha[d] concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan" at "the time of the sentencing hearing" had his attorney performed effectively as discussed above. As the Court remarked about Palacios' acceptance statement, "*[a]ctually you've given more details than I was prepared for*." (Sent. Tr. at 18). Palacios would have continued with more information in order receive the safety-valve had his attorney been effective.

GROUND TWO: SENTENCING COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S FAILURE TO AFFORD PALACIOS THE RIGHT TO ALLOCUTE

Fed. R. Crim. P. 32(i)(4)(A)(ii) provides that "[b]efore imposing sentence, the court must: (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed.R.Crim.P. 32(i)(4)(A)(ii). Here, the Court merely invited Palacios to talk about why he should be provided acceptance of responsibility. (Sent. Tr. at 13). The limited nature of this opportunity to speak was insufficient to comply with the Rule's requirement that a defendant be allowed to "speak or present *any* information to mitigate the sentence." Fed.R.Crim.P. 32(i)(4)(A)(ii). And Palacios' counsel was ineffective for failing to object to this error. As argued in Ground One, had Palacios known that he could satisfy the requirements for the safety-valve at the time of sentencing, he would have used a portion of his opportunity to speak during allocution to do so, and the Court would have then granted Palacios the two-level safety-valve reduction. Palacios was accordingly prejudiced by his counsel's failure to object. *See*, *United States v. Avila-Cortez*, 582 F.3d 602 (5th Cir. 2009).

GROUND THREE: APPELLATE COUNSEL WAS INEFFECTIVE FOR ABANDONING PALACIOS' APPEAL

Finally, Palacios argues that his appellate counsel was ineffective for abandoning his appeal. As stated, Palacios submitted a timely notice of appeal; however, Palacios' retained counsel failed to perfect the appeal. Nevertheless, once counsel filed the notice of appeal, counsel had responsibility for the appeal until the Fifth Circuit granted him leave to withdraw. *See* Practioner's Guide, Counsel's Duties at p. 15. Counsel was responsible for ensuring that his client's appeal was not adversely affected by his withdrawal. *See* Tex.Disciplinary R. Prof'l Conduct 1.15(b)(1), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar. R. Art. X, § 9). Fifth Circuit Rule 42.3.2 requires the Clerk to dismiss an appeal for want of prosecution when the appellant fails to order the transcript or pay the docketing fee. Thus a lawyer's failure to pay the required docketing fee or to timely order transcripts, which results in the dismissal of an appeal, constitutes a material and adverse effect. The Fifth Circuit Court of Appeals has consistently held that the failure of counsel to timely file or perfect an appeal upon request of the defendant constitutes ineffective assistance of counsel entitling the defendant to post-conviction relief in the form of an out-of-time appeal.

> "'[I]f privately-retained counsel continues to represent his client until the appeal stage of the proceedings arrives, he can't be permitted simply to bow out without notice either to the court or client and frustrate forever the right of the client to protect his vital interests.' Similarly, in *Woodall v. Neil*, 6 Cir. 1971, 444 F.2d 92, counsel filed a timely notice of appeal but then failed to take any further action. The court held that

> counsel's abandonment of the appeal, without notice and without the defendant's consent, deprived the defendant of the right to counsel and the right to appeal.

Chapman v. United States, 469 F.2d 634, (5th Cir. 1972)(quoting *Atilus v. United States*, 406 F.2d 694, 696 (5th Cir. 1969)(internal citations omitted)). Counsel's failure to order transcripts, pay the docketing fee, or take some other action to prevent dismissal of Palacios' appeal denied him his direct appeal and constituted ineffective assistance of counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). The remedy is an out-of-time appeal, which is accomplished by the dismissal of Palacios' § 2255 motion without prejudice and the Clerk's re-entry of the criminal judgment which begins the appellate timetable anew. *United States v. West*, 240 F.3d 456, 460-61 (5th Cir. 2001).

IV. CONCLUSION

Based on the foregoing, the Court should grant Palacios' § 2255 motion and direct the Clerk to re-enter the Court's sentencing judgment so Palacios may take and perfect a timely appeal. If the Court grant this relief, the remainder of Palacios' claims should not be considered, and this § 2255 motion should be dismissed without prejudice. However, if the Court declines to afford Palacios relief on his appellate ineffectiveness claim, the Court should still grant § 2255 relief and schedule this matter for re-sentencing for the reasons discussed herein.

Respectfully submitted,

s/ Jeremy Gordon
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served this 31st day of August, 2015, via CM/ECF on all counsel of record.

s/Jeremy Gordon